Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TAXATION WITH REPRESENTATION OF WASHINGTON,
Cross-Appellant,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Cross-Appellees.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF AMICI CURIAE OF AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN HEART ASSOCIATION, CAMP FIRE, INC., GIRL SCOUTS OF THE USA, LUTHERAN COUNCIL OF THE USA, NATIONAL AUDUBON SOCIETY, NATIONAL BOARD OF YMCAs, NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA, NATIONAL COUNCIL OF LA RAZA, NATIONAL MENTAL HEALTH ASSOCIATION, AND NATIONAL WILDLIFE FEDERATION, IN SUPPORT OF THE CROSS-APPELLANT'S JURISDICTIONAL STATEMENT

JOHN G. MILLIKEN
PAUL E. BOUSQUET
WINSTON & STRAWN
Suite 500
2550 M Street, N.W.
Washington, D.C. 20037

THOMAS A. TROYER
H. DAVID ROSENBLOOM*
ALBERT G. LAUBER
ROBERT A. BOISTURE
CAPLIN & DRYSDALE, CHARTERED
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5000

**Counsel of Record.*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
1. Legislative Activities Are An Important And Entirely Proper Means Of Achieving Charitable Purposes	4
2. The Statutory Restrictions On Lobbying By Charitable Organizations Violate The First Amendment	5
3. The Court Should Consider The Entire Case, Including The First Amendment Argument	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Bob Jones University v. *Simon*, 416 U.S. 725, 729-30 (1974) 6

Elrod v. *Burns*, 427 U.S. 347, 358 n.11 (1976) 6

Healy v. *James*, 408 U.S. 169, 183 (1972) 6

McDaniel v. *Paty*, 435 U.S. 618, 626 (1978) 5

Perry v. *Sindermann*, 408 U.S. 593, 597 (1972) 5

Pickering v. *Board of Education*, 391 U.S. 563, 568 (1968) 5

Schneider v. *State of New Jersey*, 308 U.S. 147, 163 (1939) 6

Shelton v. *Tucker*, 364 U.S. 479, 485-86 (1960) 5

Sherbert v. *Verner*, 374 U.S. 398, 404-05 (1963) 5

Speiser v. *Randall*, 357 U.S. 513 (1958) 5

Spence v. *State of Washington*, 418 U.S. 405, 413 (1974) 6

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment 4, 5, 6, 7

Internal Revenue Code (Title 26, United States Code)

Section 170(c)(2) 3, 5

Section 501(c)(3) 3, 4, 5, 6, 7

Section 501(c)(4) 6

Section 2055(a) 5

Section 2522(a) 5

MISCELLANEOUS

Bogert, *Trusts and Trustees*, § 378, at 188-191 (2nd rev. ed. 1977) 5

2 Restatement (Second) of The Law of Trusts, § 374, at 257, 260 (1959) 5

IV Scott on Trusts, § 374.4, at 2912 (3rd ed. 1967) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-134

TAXATION WITH REPRESENTATION OF WASHINGTON,
Cross-Appellant,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Cross-Appellees.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF AMICI CURIAE OF AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN HEART ASSOCIATION, CAMP FIRE, INC., GIRL SCOUTS OF THE USA, LUTHERAN COUNCIL OF THE USA, NATIONAL AUDUBON SOCIETY, NATIONAL BOARD OF YMCAs, NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA, NATIONAL COUNCIL OF LA RAZA, NATIONAL MENTAL HEALTH ASSOCIATION, AND NATIONAL WILDLIFE FEDERATION, IN SUPPORT OF THE CROSS-APPELLANT'S JURISDICTIONAL STATEMENT

INTERESTS OF AMICI CURIAE

The American Association of Museums represents museums and museum professionals throughout the nation.

The American Heart Association, a national voluntary health organization with more than 2,000,000 members and volunteers, conducts a wide range of programs to reduce the incidence of death and disability from cardiovascular diseases.

Camp Fire, Inc. is a national, voluntary youth agency serving nearly 500,000 young people affiliated with more than 300 local councils.

Girl Scouts of the USA and its more than 330 local councils provide a variety of programs and services to nearly 3,000,000 girls nationwide.

The Lutheran Council of the USA is a cooperative organization serving the Lutheran Church in America, the American Lutheran Church, and the Association of Evangelical Lutheran Churches.

The National Audubon Society, a membership organization with more than 470,000 members nationwide, is dedicated to the protection of the environment and the conservation of wildlife and other natural resources.

The National Board of YMCAs represents more than 1,850 local Associations which endeavor to promote the spiritual, mental, and physical health of their more than 11 million members and program participants.

The National Conference of Catholic Charities is an association of more than 800 charitable agencies and institutions sponsored by Catholic dioceses throughout the United States.

The National Council of Churches of Christ in the USA is the cooperative agency of 31 national Protestant and Eastern Orthodox religious bodies with an aggregate membership of over 40 million persons.

The National Council of La Raza, with over 100 affiliated organizations in 23 states, is dedicated to promoting the social and economic well-being of Americans of Hispanic descent.

The National Mental Health Association is a nationwide organization of more than 1,000,000 lay and professional persons whose principal purpose is to prevent mental illness, promote mental health, and provide better services for the mentally disabled.

The National Wildlife Federation is a conservation education organization with more than 4.2 million members and contributors nationwide.

Each of the foregoing organizations is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), and is a qualified recipient of tax-deductible charitable contributions under section 170(c)(2) of the Code, 26 U.S.C. § 170(c)(2).

Amici are filing this brief in support of the jurisdictional statement on cross-appeal filed by Taxation With Representation of Washington. That jurisdictional statement presents the following questions:

1. If, as the court of appeals held, section 501(c) and related provisions of the Internal Revenue Code deny the equal protection of the laws with respect to the regulation of lobbying, what is the proper remedy to cure the constitutional defect?
2. Does the restriction on lobbying by charities which is contained in section 501(c)(3) and related provisions of the Internal Revenue Code

constitute an unconstitutional condition upon the exercise of their First Amendment rights?

SUMMARY OF ARGUMENT

Lobbying is both a protected First Amendment activity and an important and entirely proper means of achieving charitable[1] purposes. Because section 501(c)(3) and related provisions of the Internal Revenue Code severely constrict charitable organizations' right to lobby, these statutory provisions place an unconstitutional condition on the exercise of charities' First Amendment rights. The court below addressed this First Amendment argument by pointing to alternative outlets for charities' lobbying efforts. This was error. The alternatives relied on by the court of appeals neither justify the statutory restrictions nor allow charities to pursue effectively their legitimate lobbying goals.

This First Amendment issue is inextricably linked to the equal protection issue which forms the basis of the government's appeal. Accordingly, as urged by Taxation With Representation of Washington, the Court should note probable jurisdiction as to the questions presented by the cross-appeal.

ARGUMENT

1. Legislative Activities Are An Important And Entirely Proper Means Of Achieving Charitable Purposes

The law of charitable trusts explicitly recognizes the importance and propriety of lobbying activities as a

---

[1] The terms "charity" and "charitable" are used in this brief in their generic sense, and thus encompass religious, educational, scientific, cultural, and other philanthropic organizations exempt from tax under section 501(c)(3) of the Internal Revenue Code.

means of accomplishing charitable purposes. *2 Restatement (Second) of the Law of Trusts* § 374, at 257, 260 (1959); *IV Scott on Trusts* § 374.4, at 2912 (3rd ed. 1967); Bogert, *Trusts and Trustees* § 378, at 188-191 (2nd rev. ed. 1977). In practice, the ability of many charitable organizations to accomplish their charitable purposes is directly and importantly affected by their ability to participate in the legislative process. Each of the organizations joining in this brief considers lobbying vital to the accomplishment of its charitable goals.

2. The Statutory Restrictions On Lobbying By Charitable Organizations Violate The First Amendment

In a long line of cases the Court has held that the First Amendment not only forbids direct governmental restrictions on First Amendment rights but also bars the government from conditioning the receipt of a governmental benefit upon the abandonment of a First Amendment right. *Speiser* v. *Randall*, 357 U.S. 513 (1958), *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960); *Sherbert* v. *Verner*, 374 U.S. 398, 404-06 (1963); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978).

The restriction on the lobbying activities of charitable organizations imposed by sections 170(c)(2) and 501(c)(3) and by the analogous estate and gift tax provisions[2] of the Internal Revenue Code is precisely the type of condition declared unconstitutional by this line of authority. Section 501(c)(3) and the related statutory provisions expressly condition a charity's right to receive deductible

---

[2] Sec. 2055(a) (estate tax), and sec. 2522(a) (gift tax).

contributions—a governmental benefit recognized by the Court to be of paramount importance, *Bob Jones University* v. *Simon*, 416 U.S. 725, 729-30 (1974)—on the charity's willingness to accept severe restrictions on its First Amendment right to lobby. The Court has struck down such burdens on First Amendment rights, "however slight the inducement to the individual to forsake these rights." *Elrod* v. *Burns*, 427 U.S. 347, 358 n.11 (1976).

The Court below directly addressed this First Amendment argument and acknowledged its force, but responded as follows:

> It is overly mechanistic, however, to suggest that the section 501(c)(3) lobbying restriction actually is a condition on the receipt of tax benefits by charities. A group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes.

676 F.2d 715, 726 (CADC 1982).

This response is erroneous. While it is true that section 501(c)(4) organizations may lobby, burdens on First Amendment rights have not traditionally been justified by contentions that alternative outlets for speech were available. *Schneider* v. *State of New Jersey*, 308 U.S. 147, 163 (1939); *Healy* v. *James*, 408 U.S. 169, 183 (1972); *Spence* v. *State of Washington*, 418 U.S. 405, 411 n.4 (1974). Moreover, it cannot reasonably be maintained that use of the dual organizational structure endorsed by the court of appeals represents an effective alternative to lobbying by the charity itself. However close the organizational link, the section 501(c)(4) affiliate often will not speak with the same authority as the charitable organization itself. Further, the potential for organizational conflict inherent in this dual structure seriously jeopardizes

the charity's ability to accomplish its goals. Finally, a charitable organization using a lobbying affiliate faces the continuing and often burdensome task of allocating the cost of shared employees, facilities, and expenses, a task complicated by the lack of clear legal rules for making these allocations.

The amici joining in this brief have substantial experience with the effect of the lobbying restrictions on section 501(c)(3) organizations, and could shed important light on this subject for the Court.

3. The Court Should Consider The Entire Case, Including The First Amendment Argument

If the Court hears this case, it should consider the entire case, including cross-appellant's First Amendment challenge to the lobbying restrictions imposed by section 501(c)(3) and related provisions of the Internal Revenue Code. As recognized by the court below, this First Amendment issue is inextricably linked to the equal protection issue which is the subject of the government's appeal. Consideration of both issues will enable the Court to hear and dispose of the entire case.

CONCLUSION

As urged by Taxation with Representation of Washington, the Court should note probable jurisdiction as to the questions raised by the cross-appeal.

Respectfully submitted,

THOMAS A. TROYER
H. DAVID ROSENBLOOM*
ALBERT G. LAUBER
ROBERT A. BOISTURE
CAPLIN & DRYSDALE, CHARTERED
1101 17th Street, N.W.
Washington, D.C. 20036

JOHN G. MILLIKEN
PAUL E. BOUSQUET
WINSTON & STRAWN
Suite 500
2550 M Street, N.W.
Washington, D.C. 20037

**Counsel of Record.*